M/047/0090
cc: Leslie

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BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

LIVING RIVERS, Petitioner, v. DIVISION OF OIL, GAS AND MINING, Respondent, EARTH ENERGY RESOURCES, INC., Intervenor-Respondent.	**EARTH ENERGY RESOURCES, INC.'S OPPOSITION TO PETITIONERS' MOTION TO AMEND DISCOVERY SCHEDULE AND WITNESS LIST** Docket No. 2010-027 Cause No. M/047/0090 A

Intervenor-Respondent, Earth Energy Resources, Inc. ("EER"), by and through its counsel, respectfully asks that the Utah Board of Oil, Gas and Mining ("Board") deny Petitioner Living Rivers' Interlocutory Motion for yet more discovery than EER and the Division of Oil, Gas and Mining ("Division") have already accommodated. Living Rivers' motion should be denied for at least three reasons.

I. THE APPLICABLE RULE GOVERNING DISCOVERY IN MATTERS BEFORE THE BOARD SIMPLY DOES NOT AUTHORIZE COMPELLING NON-PARTIES TO SUBMIT TO DEPOSITIONS, LET ALONE THE MULTIPLE DEPOSITIONS OF THE SAME INDIVIDUALS THAT LIVING RIVERS SEEKS.

The Board's rule on discovery is R641-108-900, and it provides:

> Upon the motion of a party and for good cause shown, the Board may authorize such manner of discovery **against another party**, including the Division or the Staff, as may be prescribed by and in the manner provided by the Utah Rules of Civil Procedure.

(Emphasis added.) The rule limits the authorization for discovery to "discovery against another party." (Emphasis added.) Clearly, the rule was intended to protect non-parties from having to involuntarily submit to discovery in Board matters, and to protect parties from the expense of such discovery.

Here, Living Rivers seeks to take the depositions of personnel from the Utah Division of Water Quality, who are not parties to this matter. R641-108-900 protects those individuals from being forced to submit to discovery in this matter. Indeed, the rule's limitation is especially important in this case, as Living Rivers seeks to depose such personnel not once, but twice: "both during the week of February 14, 2011 and after DWQ responds to or otherwise makes any decision related to the Earth Energy Resources February 8, 2011 letter." (Living Rivers' [Proposed] Order Amending Discovery Schedule and Witness List.)

Living Rivers cites no rule that authorizes the Board to force a non-party to submit to any depositions, let alone multiple depositions. The only rule Living Rivers cites is R641-106-700, which is completely inapplicable. That rule deals with continuances of hearings; nowhere does it even mention discovery.

II. EVEN IF R641-108-900 AUTHORIZES THE INVOLUNTARY PARTICIPATION OF NON-PARTIES IN DISCOVERY, LIVING RIVERS HAS FAILED TO DEMONSTRATE GOOD CAUSE.

Living Rivers asks the Board to compel three non-parties to each submit to two depositions: Rob Herbert, Mark Novak, and Mike George. Rob Herbert has apparently already volunteered to submit to a deposition, and there is no indication that his willingness to do so will be rescinded. There is no good cause to require Mr. Herbert to submit to a deposition he has already volunteered to give.

Living Rivers has not demonstrated any good cause to depose Mark Novak or Mike George. Living Rivers' motion fails to even mention Mike George until its conclusion. The motion nowhere explains why a deposition of Mike George is necessary.

Nor does Living Rivers demonstrate why a deposition of Mark Novak is necessary. All Living Rivers asserts is that Mr. Novak is identified in correspondence and he interfaced with EER. To compel a non-party to submit to a deposition (assuming a rule authorized such compulsion), there should be at least some demonstration of what relevant information the non-party possesses, which can only be discovered through a deposition. Living Rivers' motion, however, nowhere describes the information it needs to discover from Mr. Novak, how such information would be relevant to the issue before the Board, and why Living Rivers needs a deposition to obtain such information. Fundamentally, the issue before the Board is whether *the Division* erred in approving the NOI. Living Rivers has failed to demonstrate how a deposition of Mr. Novak, a DWQ employee, will reveal evidence relevant to that issue. Living Rivers' stated rationale for deposing Mr. Novak falls short. Indeed, many individuals are identified in correspondence attached to the subject Notice of Intent to Commence Large Mining Operations, but that is simply no basis to compel such persons to submit to depositions.

III. LIVING RIVERS' KNEW OF THE BASIS FOR ITS MOTION LONG BEFORE THE FEBRUARY 2, 2011 DEPOSITIONS OF DOGM PERSONNEL.

Living Rivers' assertion that it was unaware until the February 2, 2011 depositions of the Division's reliance on the DWQ's March 4, 2008 letter from Mr. Herbert is simply untrue. The DWQ's March 4, 2008 letter was attached to and referenced throughout the NOI. In fact, Living Rivers admitted that it was aware of the Division reliance on DWQ at least as early as the informal hearing held July 27, 2010, in stating, in its Request for Agency Action, dated September 27, 2010, that, "[d]uring the informal hearing, the Division indicated that stormwater and groundwater concerns were more appropriately addressed by the Utah Division of Water Quality (DWQ)." (Petitioner's Request for Agency Action, at 3.) The Division's reliance on such letter was so apparent to Living Rivers, that Living Rivers caused its expert witnesses to criticize that reliance in their testimony filed clear back on January 7, 2011. (See Prepared Direct Testimony of Elliot W. Lips at 14-15, 32, 34, 36-37.) Living Rivers' own January 7, 2011 expert testimony belies its assertion that Living Rivers just learned of the Division's reliance on DWQ's March 4, 2008 letter for the first time during the February 2, 2011 depositions.

Also false is Living Rivers' assertion that it was unaware of the minor changes to EER's process until the February 2, 2011 depositions. In fact, all but one of the changes in operations mentioned in EER's February 8, 2011 letter to Mr. Herbert (attached as Ex. 2 to Living Rivers' motion) was raised by Living Rivers' own experts, Elliot Lips or Charles Norris, in their January 7, 2011 testimony.[1] (See Prepared Direct Testimony of Elliot Lip at 36-37; Prepared Direct Testimony of Charles Norris at 12.) Living Rivers' January 7, 2011 expert testimony refutes the

[1] The only change not mentioned in Living Rivers' expert testimony is the change from a "shale shaker (or similar device)" to a horizontal belt filter and a dish filter for de-watering sands and fines.

notion that Living Rivers learned of EER's process changes through the February 2, 2011 depositions.

The impetus for Living Rivers' motion is not anything that Living Rivers learned for the first time during the February 2, 2011 depositions. Instead, Living Rivers' motion was filed out of the realization that Living Rivers has found no basis to assert that the Division erred in approving the NOI. Because of that realization, Living Rivers wants to enlist the Board in a last minute fishing expedition to increase the expense to EER before commencing mining, and to try to cobble together the basis for a challenge. EER and the Division have already been cooperative with Living Rivers by stipulating to the discovery that has occurred to date. There is simply no rule that authorizes compelling non-parties to submit to depositions in this matter, and even if there were, Living Rivers has failed to demonstrate any good cause.

For these reasons, Living Rivers' motion should be denied.

DATED this 15th day of February, 2011.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 15th day of February, 2011, a true and correct copy of the foregoing **EARTH ENERGY RESOURCES, INC.'S OPPOSITION TO PETITIONERS' MOTION TO AMEND DISCOVERY SCHEDULE AND WITNESS LIST** was served via email and by U.S. mail, postage prepaid, as follows:

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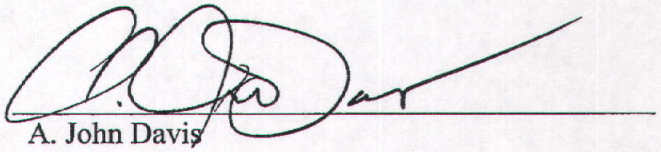

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